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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND ANDREW MARK, Defendant and Appellant.	B228442 (Los Angeles County Super. Ct. No. BA357265)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charlaine F. Olmedo, Judge. Affirmed.

Dennis P. O'Connell for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Raymond Andrew Mark, appeals the judgment entered following his conviction for grand theft and displaying a false license plate (2 counts) (Pen. Code, § 487; Vehicle. Code § 4463).[1] He was sentenced to probation for three years.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

Michael Uyehara was a hazardous materials specialist with the County of Los Angeles. On July 12, 2008, he went to a parking lot at 9545 Wentworth Street in the city of Sunland and observed a trailer with a broken hitch. The trailer contained 620 gallons of fuel. There were scrape marks in the street from the broken hitch leading to a fuel dispensing site in the Sunland city yard.

Angela Sherick-Bright worked for the City of Los Angeles as the acting assistant general manager for fleet maintenance. City employees were given access cards allowing them to obtain fuel from city yards. These cards were correlated to an assigned vehicle and to the gas tank capacity of each type of vehicle. City records showed that on July 12, 2008, between 3:20 a.m. and 4:27 a.m., diesel and unleaded fuel had been taken from the Sunland city yard. Three different city-issued access cards had been used to operate the fuel pumps.

Adam Garcia worked for Independent Studio Services at 9545 Wentworth Street in Sunland. Arriving at work on July 12, 2008, he noticed scrape marks on the ground "that went from the street into the driveway, and a fuel trailer [with a broken hitch] parked out front." Security camera video tapes showed a truck pulling into the driveway and depositing the trailer. Two men could be seen in the video. During closing argument the prosecutor asserted defendant Mark was one of the two men. The prosecutor also

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[1] All further references are to the Penal Code unless otherwise specified.

argued, however, that Mark could still be guilty as an aider and abettor even if he had not been present the night the fuel was stolen.

Gevork Sukunyan, the owner of Express Gears, a company that transports automobiles, had done work for Mark in the past. At some point, Mark offered to sell Sukunyan fuel at a 25 percent discount. Sukunyan testified he purchased discount fuel from Mark over a period of two or three months, paying both in cash and by check. As instructed, the checks were sometimes made out to the Medusa Salon and sometimes to Mark directly. Sukunyan's father took delivery of some of this fuel, but Sukunyan was the only one who wrote the checks. Sukunyan pled guilty to receiving stolen property.

Andy Aguayo was a detective with the Commercial Crimes Division of the Los Angeles Police Department. On April 29, 2009, he conducted a surveillance operation against Mark. He saw Mark arrive in a white Mustang at 12th Street between Hill and Broadway in Los Angeles. Mark removed the Mustang's rear license plate and placed it on the dashboard so that it covered the Vehicle Identification Number plate. Over the middle of the dashboard he affixed a vehicle placard, which was a "city seal . . . meaning what the police cars have on the side of the door."

Laurel Jump worked as a management analyst for the Los Angeles Bureau of Street Services. She testified Mark worked for the city as a truck operator. He was not authorized to have an official City of Los Angeles vehicle placard. Placing this placard on the dashboard exempted his vehicle from certain parking restrictions. As a truck operator, Mark would not normally have been issued a key to the Sunland yard allowing access to the fuel pumps when the yard was closed.

Mark told Detective Lorenzo Barbosa of the Commercial Crimes Division that he owned the Madusa Salon. Barbosa located a black truck belonging to Mark. This truck matched the one seen in the surveillance videos in several key respects. The truck's license plate registration sticker did not belong to the truck, but to another vehicle which was owned by someone else.

When Barbosa executed a search warrant at Sukunyan's business, he found numerous 55-gallon plastic barrels containing small amounts of gasoline or diesel fuel. Sukunyan told Barbosa these were Mark's barrels. At Mark's residence, Barbosa found a plastic barrel and five hoses; the hoses smelled of fuel and had been altered for use as siphoning tools.

2. *Defense evidence.*

John Fagan supervised concrete and asphalt crews for the City of Los Angeles. Mark had formerly worked for him on a crew that ground down the cracks in concrete sidewalks. Fagan had known him for 12 years. Fagan testified he had never witnessed any acts of dishonesty by Mark during the time they worked together. One of Mark's jobs was to make the city vehicle placards for employees and supervisors. Fagan was familiar with the Sunland city yard. There were about 20 or 25 people who had access to that facility. Many people had keys to the yard in 2008. Fuel access cards were left in the trucks and the trucks were not locked.

Gregory Mark, the defendant's brother, was on parole for a felony conviction. Gregory testified he and Kevin O'Connor were the ones who stole the fuel. Although they used Mark's truck, Mark was not involved. Gregory would borrow Mark's truck to pick up fuel from the Sunland yard because O'Connor had a key to the yard. O'Connor used a credit card to access the fuel pumps. Gregory and O'Connor delivered the fuel to "[s]ome Armenians" who owned a car lot. Gregory received checks in return for the fuel, and he would write Medusa Salon in as the payee and have Mark cash them. The Armenians never paid in cash. The last time Gregory saw O'Connor was on July 12, 2008, when they hitched a trailer to Mark's truck and the trailer broke. Gregory told police he was the person seen on the surveillance tape getting out of the truck and arguing with O'Connor, and that Mark did not appear on the surveillance tape. Gregory and O'Connor split the profits from the fuel thefts with Gregory receiving maybe 15 to 20 percent plus some "dope on the side, too."

3. *Rebuttal evidence.*

Mark told Detective Barbosa he had been in Texas on the day the trailer broke down at the Sunland city yard. Barbosa identified numerous inconsistencies between Gregory's police interview and his trial testimony. For example: Gregory insisted the broken trailer incident had occurred in April, not July; he could not provide even a ballpark estimate of the amounts on the checks he supposedly received from the Armenians; he said he did not receive any compensation for selling the fuel and he certainly was never paid in drugs.

CONTENTIONS

1. The trial court erred by not instructing the jury that Sukunyan was an accomplice as a matter of law.

2. Mark's trial attorney rendered ineffective assistance.

DISCUSSION

1. *Trial court did not err by neglecting to instruct the jury that Sukunyan was an accomplice as a matter of law.*

Mark contends his convictions must be reversed because the trial court failed to instruct the jury, sua sponte, that Sukunyan was an accomplice as a matter of law. This claim is meritless.

a. *Legal principles.*

Section 1111 defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." An accomplice is one who acts with " 'knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' " (*People v. Stankewitz* (1990) 51 Cal.3d 72, 91.) Whether a person is an accomplice is a question of fact for the jury unless there is no dispute as to either the facts or inferences to be drawn from the facts. (*People v. Fauber* (1992) 2 Cal.4th 792, 834; *People v. Williams* (1997) 16 Cal.4th 635, 679 [trial court may only instruct that witness is accomplice as matter of law if facts establishing culpability are clear and undisputed].)

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense . . . ." (§ 1111.) "To corroborate the testimony of an accomplice, the prosecution must present 'independent evidence,' that is, evidence that 'tends to connect the defendant with the crime charged' without aid or assistance from the accomplice's testimony. [Citation.] Corroborating evidence is sufficient if it tends to implicate the defendant and thus relates to some act or fact that is an element of the crime. [Citations.] ' "[T]he corroborative evidence may be slight and entitled to little consideration when standing alone." [Citation.]' [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 562-563.)

b. *Discussion*.

Mark argues Sukunyan was an accomplice as a matter of law because he knowingly purchased stolen fuel and pled guilty to receiving stolen property. The Attorney General, however, argues there was no evidence connecting Sukunyan to anything more than receiving stolen property. The Attorney General is right.

"It is settled that the thief and the one knowingly receiving stolen property from him are guilty of distinct and separate substantive offenses and are not accomplices of each other. [Citations.] An exception to the rule is recognized when the thief and the receiver conspire together in a prearranged plan whereby one is to steal and the other is to buy." (*People v. Raven* (1955) 44 Cal.2d 523, 526 [no prearranged plan shown even though thief sold jeep tires and power tools to receiver who dealt in used goods and knew beforehand some items had been stolen]; compare *People v. Lima* (1944) 25 Cal.2d 573, 576 [prearranged plan shown where, early in olive season, defendant agreed to buy all the olives thieves could steal] with *People v. McKunes* (1975) 51 Cal.App.3d 487, 493 [prearranged plan not shown where thief knew receiver would be interested in purchasing stolen items but there was no "firm agreement"].)

Here, Mark alleges only that Sukunyan knew the fuel had been stolen. Mark does not point to any evidence showing there had been a pre-existing agreement for Sukunyan to purchase fuel that Mark would steal for him. In these circumstances, the "accomplice as a matter of law" instruction was unwarranted.

2. *There was no ineffective assistance of counsel*.

Mark contends he was denied effective assistance of counsel because his attorney failed to request certain jury instructions and failed to call a particular witness to testify for the defense. These claims are meritless.

a. *Legal principles.*

A claim of ineffective assistance of counsel has two components: " 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of reasonableness.' [Citation.] To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391 [120 S.Ct. 1495].) "[T]he burden of proof that the defendant must meet in order to establish his entitlement to relief on an ineffective-assistance claim is preponderance of the evidence." (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

"[I]f the record sheds no light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation for counsel's performance. [Citation.]" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) An appellate court "need not determine whether counsel's performance was deficient

before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland v. Washington* (1984) 466 U.S. 668, 697 [104 S.Ct. 2052].)

"Where the record shows that the omission or error resulted from an informed tactical choice within the range of reasonable competence, we have held that the conviction should be affirmed." (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1215; see *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 [decision whether to put on witnesses is "matter[] of trial tactics and strategy which a reviewing court generally may not second-guess"].) "[T]he choice of which, and how many, of potential witnesses [to call] is precisely the type of choice which should not be subject to review by an appellate court." (*People v. Floyd* (1970) 1 Cal.3d 694, 709, disapproved on other grounds by *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36.) "It is not sufficient to allege merely that the attorney's tactics were poor, or that the case might have been handled more effectively. [Citations.] [¶] Rather, the defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions cannot be explained on the basis of any knowledgeable choice of tactics." (*People v. Floyd*, *supra*, at p. 709.)

b. *Discussion*.

As to each claim raised by Mark, the record demonstrates defense counsel had a valid tactical reason for what he did.

(1) *CALCRIM No. 315.*

Mark asserts, "One of the issues that was hotly contested was Mr. Sukunyan's identification of Appellant. In that regard CALCRIM 315 regarding the factors to consider on eyewitness testimony should have been requested."

CALCRIM No. 315 is a specialized instruction suggesting particular factors for a jury to consider when evaluating the quality of an eyewitness identification. However, other than the first factor, "Did the witness know or have contact with the defendant before the event?", all the others primarily relate to problems with stranger identifications, e.g., "How well could the witness see the perpetrator?", "How closely was the witness paying attention?", "Was the witness under stress when he or she made the observation?", etc. Here, Sukunyan testified he was acquainted with Mark and had

done business with him on multiple occasions. The defense did not argue he had misidentified Mark. Rather, the defense argued Sukunyan had lied by claiming he purchased the stolen fuel from Mark because he was trying to protect his father. There was no reason to request CALCRIM No. 315 in this situation. "[C]ounsel is not required to make futile motions or to indulge in idle acts to appear competent." (*People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091.)

(2) *CALCRIM No. 350.*

Mark contends defense counsel should have requested the character evidence instruction, CALCRIM No. 350,[2] because it "states in essence that evidence of the defendant's good character *by itself* may create a reasonable doubt as to the defendant's guilt," and evidence was presented showing Mark's "character for honesty." This instruction would have been based on the following testimony by John Fagan, Mark's former supervisor:

"[Defense counsel: What's your sense of the type of employee that he is or was when he worked for you?

"[Fagan]: Real good. Good employee. I'm not sure if I'm –

"Q. Did you ever have any problems with him? Any issues?

"A. No.

"Q. Any acts of dishonesty?

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[2] CALCRIM No. 350 provides: "You have heard character testimony that the defendant (is a <insert character trait> person/ [or] has a good reputation for <insert character trait> in the community where (he/she) lives or works). [¶] You may take that testimony into consideration along with all the other evidence in deciding whether the People have proved that the defendant is guilty beyond a reasonable doubt. [¶] Evidence of the defendant's character for <insert character trait> can by itself create a reasonable doubt. However, evidence of the defendant's good character may be countered by evidence of (his/her) bad character for the same trait. You must decide the meaning and importance of the character evidence. [¶] [If the defendant's character for certain traits has not been discussed among those who know (him/her), you may assume that (his/her) character for those traits is good.]"

"A. No.

"Q. Okay. Did you ever write him up for any –

"A. No."

Evidence Code section 1101, subdivision (a), states: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

However, Evidence Code section 1102 provides: "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. [¶] (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)."

"Under [Evidence Code section 1102], a defendant in a criminal action may introduce evidence of his character or a trait of his character in the form of an opinion or evidence of reputation, *but not in the form of specific conduct*, in order to prove conduct in conformity with such character or trait of character." (*People v. Honig* (1996) 48 Cal.App.4th 289, 348, italics added; accord *People v. Felix* (1999) 70 Cal.App.4th 426, 431-432.) "As the Law Revision Commission's comments to section 1102 make clear, evidence of specific acts of the accused are, as a general rule, inadmissible to prove his disposition to commit such acts . . . ." (*People v. Wagner* (1975) 13 Cal.3d 612, 619.)

Fagan's testimony did not qualify as character trait evidence by way of reputation because it was testimony about specific conduct. Fagan testified Mark had been a "good" employee, he had never seen any "acts of dishonesty" by Mark, and he had never "written [Mark] up." Hence, had defense counsel requested CALCRIM No. 350, the trial court would have properly refused to give it. (See *People v. Torrez, supra,* 31 Cal.App.4th at p. 1091 [counsel not required to indulge in idle acts to appear competent].)

(3) *CALCRIM No. 3400*.

Mark contends defense counsel should have requested CALCRIM No. 3400[3] because it "tells the jury that [it] must believe the defendant was present when the crime was committed beyond a reasonable doubt." He argues this instruction was important because there was evidence he had been in Texas when the fuel was taken from the Sunland yard.

But this alibi evidence was weak and undeveloped. It consisted *solely* of Detective Barbosa's testimony that, when he spoke to Mark, the defendant claimed to have been in Texas on the day "the trailer broke down . . . in the area of the Sunland district yard." Mark neither testified himself nor put on any evidence tending to show he was out of the state on the day the trailer broke down. In any event, Mark is ignoring the second half of CALCRIM No. 3400, which informs the jury that an aider and abettor need not be present at the crime scene. (See fn. 3, *ante*.)

(4) *Failure to call defense witness.*

Mark contends defense counsel was ineffective for failing to call Dale Reichhart[4] as a witness. But the records shows Reichhart would not have been a helpful witness.

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[3] CALCRIM No. 3400 provides: "The People must prove that the defendant committed <insert crime[s] charged>. The defendant contends (he/she) did not commit (this/these) crime[s] and that (he/she) was somewhere else when the crime[s] (was/were) committed. The People must prove that the defendant was present and committed the crime[s] with which (he/she) is charged. The defendant does not need to prove (he/she) was elsewhere at the time of the crime. [¶] If you have a reasonable doubt about whether the defendant was present when the crime was committed, you must find (him/her) not guilty. [¶] [However, the defendant may also be guilty of <insert crime[s] charged> if (he/she) (aided and abetted/ [or] conspired with) someone else to commit (that/those) crime[s]. If you conclude that the defendant (aided and abetted/ [or] conspired to commit) <insert crime[s] charged>, then (he/she) is guilty even if (he/she) was not present when the crime[s] (was/were) committed.]"

[4] In his opening brief, Mark spells this name "Richart." However, the new trial motion spells the name "Reichhart," while the proposed witness's attached declaration spells his name both "Richhart" and "Reichhart."

In support of Mark's new trial motion, Reichhart submitted a declaration stating he had participated in the fuel theft along with Gregory, and that Mark had not been involved. But the new trial motion itself shows Reichhart would not have been a helpful defense witness. The new trial motion stated: "After taking a recorded statement from the defendant, Det. Barbosa then went to meet with Reichhart to find out whether the defendant's story 'checked out.' At that time, Reichhart implicated the defendant in the Sunland yard thefts. . . . However, post-trial, in his attached declaration, Reichhart admits that he lied about the defendant and it was Greg Mark with whom he stole gasoline, which was then sold to the elder Sukunyan."

As the Attorney General points out: "Obviously, given that [Reichhart] initially implicated defendant in the thefts, but then later changed his story, . . . defense counsel could have reasonably believed that calling him as a witness would have been sorely damaging, if not fatal, to appellant's case."

Even apart from the fact Reichhart at one time told police Mark was guilty, Reichhart's new trial declaration essentially contradicts Gregory's alibi testimony that it was he and Kevin O'Connor who stole the fuel. Reichhart's declaration says he and Gregory stole the fuel, and it makes no mention of O'Connor.

In sum, there was no ineffective assistance of counsel in failing to request these three instructions or failing to call Reichhart as a trial witness.[5]

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[5] Mark argues that, even if harmless individually, the cumulative effect of these claimed trial errors mandates reversal of his convictions. Because we have found no instructional errors, this cumulative error argument fails. (See *People v. Seaton* (2001) 26 Cal.4th 598, 639; *People v. Bolin* (1998) 18 Cal.4th 297, 335.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.